SUPREME COURT, U.S.
MAY 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1106

SWEET BRIAR INSTITUTE,

Appellant,

v.

ROBERT Y. BUTTON, ET AL.,

Appellees.

Appeal from the United States District Court
for the Western District of Virginia

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

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STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated April 24, 1967, the Attorney General of Virginia was requested to file a response to the appeal taken from an order of the United States District Court for the Western District of Virginia abstaining from further consideration of the instant case pending consideration and action by the appropriate State courts of both the State and Federal questions sought to be presented here and simultaneously pending in the courts of the Commonwealth. In accordance with the request con-

tained in the above-mentioned communication,* written by the Clerk at the direction of this Court, the within response is filed. The appellees, believing that the matters set forth herein will demonstrate the lack of substance in the question sought to be presented by this appeal, file this statement in opposition to appellant's jurisdictional statement and include their motion to affirm the judgment of the court below upon the ground that the question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

PRIOR PROCEEDINGS

On April 25, 1966, plaintiff instituted in the United States District Court for the Western District of Virginia this suit for preliminary and permanent injunctions allegedly to restrain the enforcement, operation and execution by defendants of Section 55-26 of the Code of Virginia (1950). Jurisdiction was invoked under 28 U.S.C.A. 1331 and 1343(3), (4); Sections 202-204 and 207 of the Civil Rights Act of 1964; the Fourteenth Amendment to the Constitution of the United States and 28 U.S.C.A. 2281 and 2284—the latter two statutes providing for the convening of a District Court of three judges to hear and determine suits in which restraint of the enforcement of a State statute, upon the ground of such statute's unconstitutionality, is sought.

A District Court of three judges having been designated by the Chief Judge of the United States Court of Appeals for the Fourth Circuit, defendants filed their joint motion to dismiss the complaint on May 16, 1966, setting forth therein the several grounds upon which such motion was predicated. One of the grounds stated in defendants' mo-

* Post, Appendix A.

tion invoked the doctrine of abstention by asserting that the District Court should not entertain the suit because the provisions of Virginia law to which reference was made in the complaint had not been authoritatively construed by the Supreme Court of Appeals of Virginia with respect to the situation set forth in the complaint and, therefore, the constitutional issues sought to be presented might be modified or removed if the provisions of Virginia law in question were first considered by the courts of the Commonwealth of Virginia. Plaintiff subsequently amended the original complaint to include a request for a declaratory judgment and the cause was heard on the record made, trial briefs and oral argument on July 6, 1966. Subsequently, on December 7, 1966, the District Court filed its opinion and order staying and suspending further prosecution of the action "until the Circuit Court of Amherst County, Virginia, and the Supreme Court of Appeals of Virginia have considered and acted upon the State and Federal questions submitted, in both the original and amended complaints, to the Circuit Court of Amherst County in the suit therein styled Sweet Briar Institute v. William M. McClenny, et al. and designated as Case No. 1383; . . ." See, Jurisdictional Statement, p. 28a. The District Court retained jurisdiction of the action pending the above-mentioned stay and suspension.

STATEMENT OF FACTS

Plaintiff in the case at bar, Sweet Briar Institute, is a private, non-stock corporation created pursuant to the last will and testament of its founder-benefactress, Indiana Fletcher Williams, dated April 3, 1889, for the purpose of establishing and maintaining in Virginia "a school or seminary for the education of white girls and young women." See, Jurisdictional Statement, p. 2a.

Defendants in the instant case are the Commonwealth's Attorney for Amherst County, Virginia, in which Sweet Briar Institute is located, and the Attorney General of Virginia.

On August 17, 1964, plaintiff filed in the Circuit Court of Amherst County, Virginia, a bill of complaint requesting a judicial interpretation and construction of the above-mentioned last will and testament and praying the aid, guidance and direction of that court with respect to the authority of the directors of Sweet Briar Institute to admit otherwise qualified applicants for admission without regard to race or color. Named as defendants in that suit were the Commonwealth's Attorney for Amherst County and the Attorney General of Virginia, both of whom filed timely pleadings in response to the bill of complaint, including an answer by the Attorney General of Virginia.

On June 3, 1965, and April 6, 1966, the Circuit Court of Amherst County, by letter memoranda, initially indicated and subsequently confirmed that it was of the opinion that (1) no actual controversy existed (2) that the relevant language of the will under consideration was not ambiguous or in need of judicial interpretation (3) that application of the cy pres or deviation doctrine would not be proper under the circumstances and (4) that an order would be entered dismissing the complaint. On May 25, 1966, an order effectuating the court's decision was duly entered, which order also permitted the plaintiff to file an amended and supplemental bill of complaint, and directed the clerk of the Circuit Court of Amherst County to receive the amended and supplemental bill and make it a part of the record in the State court proceedings. (Jurisdictional Statement, p. 47a)

The amended and supplemental bill, which set forth in detail the precise question sought to be tendered in the instant

proceedings, was subsequently filed pursuant to the above-mentioned order, and the defendants subsequently filed their joint answer joining in the prayer of the amended and supplemental bill that the will of Indiana Fletcher Williams be interpreted and construed in light of the facts and circumstances set out in the amended and supplemental bill, that the parties be accorded the aid, guidance and direction of the court with respect to such matters and that the court render a declaratory judgment making a binding adjudication of the rights, duties, powers and authorities of the parties. This cause is now pending in the Circuit Court of Amherst County, Virginia.

THE STATUTE INVOLVED

Under consideration in the instant proceedings is Section 55-26 of the Code of Virginia (1950) which provides:

> "Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons, and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled 'an act concerning devises made to schools, academies, and colleges.' Nothing in this

section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary."

QUESTION PRESENTED

Did the District Court abuse its discretion in abstaining from a consideration of the constitutional issues sought to be presented in the instant case until the appropriate State court had considered and decided both State and Federal questions in a companion action previously instituted by plaintiff and simultaneously pending in the State court?

ARGUMENT

The District Court Did Not Abuse Its Discretion In Invoking The Doctrine Of Abstention In The Case At Bar

During the course of its opinion, the District Court reviewed the prior history of the instant litigation in the State court, noting (1) that the plaintiff had elected to institute in the Circuit Court of Amherst County an action against the identical parties who are appellees here (2) that in those proceedings the plaintiff attacked the challenged racial restriction as violative of the Fourteenth Amendment (3) that the State Court had announced its decision before the present suit was filed in the District Court (4) that the decree effectuating the State court's opinion allowed the plaintiff to amend its complaint and (5) that the State case now stands for hearing on the amended complaint in the State court. See, Jurisdictional Statement, p. 4a.

Thereafter, the District Court stated (Jurisdictional Statement, p. 4a):

> "Relying upon the plaintiffs' [sic] election to proceed first in the State court, the present pendency of that case and the decision rendered therein, the defendant officials moved for dismissal of the Federal suit, or

for abstention here from further proceedings until the college had carried its case through the State courts, trial and appellate. After considering the record and the arguments of counsel on brief and orally, we have decided to abstain.

"This course is dictated *first* because the law does not allow the prosecution of a second suit after a concomitant suit has been decided. *Next,* it is dictated by the established principle that the Federal courts should not pass upon controversies primarily dependent for solution upon local law until the State courts have ruled upon them in consideration of the Federal grounds of attack. Thirdly, only through abstention here can the college procure a complete answer to its desire for a judicial ruling upon the present vitality of the restriction."

Although exhaustive consideration was accorded each of the above specified grounds of abstention by the District Court, it clearly pointed out that (Jurisdictional Statement, p. 9a):

> "The paramount ground for abstention, however, is that the resolution of conflicting views under the State law is the exclusive province of the State courts until a Constitutional question develops. But even then the question *must first* be left to the State courts to consider and decide it 'in light of the constitutional objections presented to the [Federal court].' Government Employees v. Windsor, 353 US 365, 366 (1957). See Meridian v. Southern Bell T. & T. Co., 358 US 639, 640 (1959); Spector Motor Co. v. McLaughlin, 323 US 101, 104 (1944). In *Windsor* the decision was reversed because the complainant had not submitted the Federal issues to the State court."

The propriety of the District Court's invocation of the doctrine of abstention for this paramount reason is easily demonstrable. A mere reading of the complaint filed and the statute challenged in the instant proceedings clearly

establishes that the case at bar is one in which the federal question sought to be tendered by appellant is admittedly and entirely dependent upon the subordinate interpretation of the statute under attack. While appellees basically maintain that appellant's constitutional contention is without merit under any circumstances, it is indisputable that such contention is altogether lacking in substance unless the challenged statute—*as matter of State law*—requires the construction appellant seeks to place upon it. It is not too much to say that, unless the statute under consideration requires the interpretation appellant ascribes to it, there is no federal constitutional issue in this case at all.

It is a well recognized and firmly precedented rule that Federal courts will not exercise their equity powers to prevent the operation of a State statute or undertake to decide cases presenting federal constitutional issues when those issues might be substantially modified or entirely removed by a State court determination of the State law involved. A host of decisions of this Court, with which each member of this Court is thoroughly familiar, can easily be marshaled to support the validity of this principle and to demonstrate its applicability to the case at bar. *Clay* v. *Sun Ins. Office*, 363 U.S. 207; *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167; *Louisiana Power and Light Company* v. *Thibodaux*, 360 U.S. 25; *Government & C.E.O.C., C.I.O.* v. *Windsor*, 353 U.S. 364; *Leiter Minerals, Inc.* v. *United States*, 353 U.S. 220; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496

In *Louisiana Power & Light Co.* v. *Thibodaux, supra*, this Court reversed a judgment of the Court of Appeals for the Fifth Circuit and reinstated an order of the District Court for the Eastern District of Louisiana staying further proceedings in an expropriation suit, pending in the district court, until the Supreme Court of Louisiana had been afforded an opportunity to interpret the Louisiana

statute upon which the city's authority to expropriate was predicated. Particularly pertinent to the issue presented in the case at bar are certain portions of the dissenting opinion. Although expressing the view that the failure of the district court to exercise jurisdiction was inappropriate under the circumstances of that case—primarily because no injunctive relief, which would have prohibited State officials from acting, was sought and because the case did not involve the potential friction which results when a federal court applies paramount federal law to strike down state action—the dissenting justices nevertheless fully acknowledged "the two recognized situations justifying abstention" and commented upon them in the following language (360 U.S. at 32-33):

> "* * * The doctrine of abstention originated in the area of the federal courts' duty to avoid, if possible, decision of a federal constitutional question. This was Railroad Com. v. Pullman Co., 312 US 496, 85 L. Ed. 971, 61 S.Ct. 643. * * * *Numerous decisions since then have sanctioned abstention from deciding cases involving a federal constitutional issue where a state court determination of state law might moot the issue or put the case in a different posture.*"

In *Government & C.E.O.C., CIO* v. *Windsor, supra,* this court held that a three-judge District Court should refrain from deciding the constitutionality of the State statute there involved until definite determinations had been made by the State courts of local law questions. In this connection, the Court pointed out (353 U.S. at 366):

> "* * * In an action brought to restrain the enforcement of a state statute on constitutional grounds, *the federal court should retain jurisdiction until a definite determination of local law questions is obtained from the local courts.* * * * The bare adjudication by the Alabama Supreme Court that the union is subject to

this Act does not suffice, *since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court.* If appellants' freedom-of-expression and equal-protection arguments had been presented to the state court, it might have construed the statute in a different manner. * * *" (Italics supplied)

So clear is it that numerous subsidiary questions of local law require authoritative interpretation by the Virginia courts in light of appellant's federal constitutional claims that the District Court had no difficulty in specifying a number of them in the following language (Jurisdictional Statement, pp. 11a-12a):

"We have shown that the plaintiff must 'expose', as it says, the restriction and the prohibitions to the State court under the focus of the Federal strictures upon them. In this at least the following questions seemingly need to be answered by the State court *in the light of the Federal Constitution:*

1. Whether a will made more than fifty years before the Supreme Court's racial decisions were rendered should be affected by these subsequent enunciations;

2. Whether Triplett v. Trotter, supra, decided in 1937, will still be retained by her courts as the law of Virginia in view of the racial decisions of the Federal courts since 1937;

3. Whether the testatrix included the racial stipulation in 1899 by reason of the existence of the Virginia statute or because of her own volition.[1] Cf. Justice Harlan dissenting in Evans v. Newton, 382 US 296, 315 (1966);

4. Whether, if the racial clause of the Williams will is held inoperative, the trust fails entirely; or can be terminated by the Virginia legislature under section 55-34 of the Code of Vir-

ginia, 1950; or is subject to the application of the cy pres doctrine under section 55-31 of the Code; or some other disposition is proper;

5. Whether § 140 of the Virginia Constitution and § 22-221, Virginia Code, briefed by the college as unlawfully compelling racial segregation in private schools, apply to such schools; and

6. Whether the Virginia statutes pertaining to the conferring of academic degrees; exemption of property from condemnation and taxation; police protection; power of the State to abrogate the trust; and other subjects related to educational institutions, imbue Sweet Briar with a State character, as its brief suggests."

With respect to what is perhaps the foremost of the State law questions, counsel for appellant lay great stress upon the decision of the Supreme Court of Appeals of Virginia in *Triplett* v. *Trotter*, 169 Va. 440, 193 S.E. 514, asserting that in that case the Virginia Supreme Court held that the segregation requirement must be read into every bequest or devise for establishment or maintenance of an educational institution, even though such bequest or devise be silent on the subject of racial segregation. No such language appears in the opinion in that case, either by way of holding, dictum or collateral observation. Under consideration in *Triplett* was the validity under Virginia law of the provisions of a will establishing a trust to assist "all worthy and dependent young men to obtain a business education . . ." *Triplett* v. *Trotter, supra,* at 442. The Court's holding in that case is contained in the following language (169 Va. at 445):

"We, therefore, reach the conclusion that the gift to establish and maintain a college for the education of such 'worthy and dependent young men' as may be selected by a board of trustees designated or provided

for in the will, and as the income of the trust will permit, is on its face a valid gift for educational purposes under Code, section 587."

Moreover, the *Triplett* case was not decided until 1937, some forty-four years after the execution of the will of Indiana Fletcher Williams. Thus, even if the decision in that case could be read in the manner for which plaintiff contends, it could not possibly have played any part in the execution of the will here under attack.

Quite to the contrary, the status of the decisional law in Virginia with respect to the validity of educational trusts at the time of the execution of the will of Indiana Fletcher Williams is reflected in *Protestant Episcopal Evangelical Society* v. *Churchman,* 80 Va. 718, decided in 1885. In that case, the Supreme Court of Appeals of Virginia held valid, under the provisions of what is now Section 55-26 of the Virginia Code, a bequest "for educating poor young men for the Episcopal Ministry . . ." *Protestant Episcopal Evangelical Society* v. *Churchman, supra,* at 756. No provision was made in the will there under consideration with respect to any racially segregated classification of the beneficiaries of the trust and none was required for validation of the trust. So far as counsel for defendants are aware, there has been no decision of the Supreme Court of Appeals of Virginia which invalidated a trust for educational purposes because the beneficiaries of such trust were not classified on the basis of race, nor has there been any decision of the Supreme Court of Appeals of Virginia validating a trust made expressly for the benefit of a biracial class. Certainly, there is no provision of Virginia law which specifically invalidates a trust of the latter type.

In addition, it is clear that an authoritative interpretation of Section 140 of the Virginia Constitution and Section 22-221 of the Virginia Code is necessary to any consideration of

appellant's claims arising under Sections 202-204 and 207 of the Civil Rights Act of 1964. 42 U.S.C.A. §§ 2000a-1 through 2000a-3, 2000a-6, (1964). In this connection, appellant asserts that the above specified provisions of Virginia law require racial segregation in *private* schools. By contrast appellees—pointing out that the provisions in question are found in the Virginia law relating to the establishment of *public, free* school system throughout the Commonwealth—insist that these provisions do not now and never have been applicable to private schools in general or to Sweet Briar Institute in particular. Clearly, no proper consideration can be given by this Court to this aspect of appellant's case until these Virginia constitutional and statutory provisions have been accorded authoritative interpretation by the Supreme Court of Appeals of Virginia.

In light of the foregoing, counsel for appellees submit that the instant litigation presents a classic case for application of the abstention doctrine. In its amended and supplemental bill of complaint—which was pending in the State court when the instant case was heard—Sweet Briar Institute asked the State court to interpret Section 55-26 of the Virginia Code "in light of the constitutional objections" sought to be presented to the District Court. See, *Government & C.E.O.C. CIO* v. *Windsor, supra,* at 366. Thus, appellant has raised in the State court the precise issue of statutory interpretation, within the context of its constitutional contentions, which it would have the District Court prematurely and inappropriately pass upon in advance of a State court's determination of the local law questions upon which appellant's entire constitutional claim is predicated. Had the District Court ignored the doctrine of abstention and undertaken to proceed to a consideration of the Federal constitutional issues posed by appellant, the District Court would have had to decide these subsidary questions of State law itself. This procedure would neces-

sarily have entailed a forecast by the District Court of the only authoritative opinion which can be rendered upon such questions—that of the Supreme Court of Appeals of Virginia. Only by requiring completion of the process of State court adjudication which appellant voluntarily elected to initiate can the Federal questions in this case be presented to this Court in clean cut form, unclouded by doubts concerning the proper resolution of the underlying State law questions. This procedure is not only consistent with that by which both of the *Girard College* cases and *Evans* v. *Newton*, 382 U.S. 296, reached this court, but any other procedure would manifestly be antagonistic to the consistent pronouncements of this Court. See, *Pennsylvania* v. *Board of Trusts*, 353 U.S. 320 (1957); *Pennsylvania* v. *Board of Trusts*, 357 U.S. 570 (1958). See also, Jurisdictional Statement, p. 13a.

In addition, counsel for appellees wish to emphasize that the appellant has controlled the course of this litigation from its inception in the Circuit Court of Amherst County, and is entirely responsible for the procedural disarray with which the District Court was confronted. Commenting upon the appellant's procedure in this connection, the District Court pointed out (Jurisdictional Statement p. 10a-11a):

> "Indeed, the net effect of the plaintiff's procedure is to acknowledge the obligation of submitting the issue primarily to the State court. The following recital of the procedure discloses this intention:
>
> > "(1) First, the Federal and State questions were initially submitted to the Circuit Court of Amherst County and there decided;
> >
> > "(2) Later, on the same grounds included in the State suit, plaintiff began this additional action in the Federal court;

"(3) Then plaintiff amended the State complaint and asked the State court to '*dispose of the questions of State law in the light of complainant's Federal contentions*' reserving the right to go back to the Federal court, if not satisfied with the State court's ruling on the Federal issues; and

"(4) Finally, plaintiff tells the State court that the college *may return there still again* if not satisfied with the Federal court's ruling on the Federal points.

"Yet, now the college asks for an immediate adjudication by the Federal court."

Surely, the well-nigh schizophrenic display of forum shopping evidenced by the above quoted chronology cannot be countenanced under the previously cited decisions of this Court. See also, *England* v. *Medical Examiners*, 375 U.S. 411; *Tomiyasu* v. *Golden*, 9 Cir., 358 F. (2d) 651. It is perfectly apparent that appellant—disappointed with the decision of the Circuit Court of Amherst County—has attempted to substitute resort to the District Court for an appeal from the order of the State court. As appellant states in its jurisdictional statement, the original bill of complaint in the State court was filed on August 17, 1964, oral arguments were heard in December, 1964, and the State court's opinion indicating its disposition of the case was announced, by letter memorandum to counsel, on June 3, 1965. Less than a year elapsed from initiation of the State court proceedings to their disposition by the trial court, with right of appeal to the Supreme Court of Appeals of Virginia. Yet, instead of seeking immediate entry of an order effectuating the decision of the State trial court so that a proper appeal might be perfected, appellant—after the expiration of a period of over nine

months—instituted the present litigation in the District Court.

Sweet Briar Institute now attempts to make it appear that appellees are responsible for the almost amorphous procedural posture of this litigation. Referring to the State trial court's opinion of June 3, 1965, counsel for appellant make the astounding assertion that at this point "a state court decree sustaining the demurrer was available to *appellees* for the asking." (Emphasis supplied) See, Jurisdictional Statement, p. 12. Surely, such a statement cannot conceal the fact that such a decree was equally available to *appellant* for the asking and should have been promptly sought by Sweet Briar Institute so that the State trial court's disposition of appellant's claims could be reviewed by the Supreme Court of Appeals of Virginia, with right of further review of appellant's Federal claims by this Court. Indeed, counsel for appellees submit that if this manifestly appropriate course had been followed, the litigation initiated by Sweet Briar Institute in the Circuit Court of Amherst County in 1964 would have completed its passage through the Supreme Court of Appeals of Virginia and, if successfully prosecuted to this Court by either party, be now *properly* pending for review of the decision of the highest court of the Commonwealth. That such is not the case is entirely the result of appellant's attempt to substitute an independent Federal court action for a direct State court appeal, and to prosecute separate actions involving the same questions in both the State and Federal courts at the same time. The District Court properly refused to place its imprimatur on such procedural behavior, aptly characterizing it as "a maneuver sharply disapproved by the Supreme Court." See Jurisdictional Statement, p. 8a.

Surely, in light of the prior procedural history of this litigation when the case was heard by the District Court,

it cannot be said that the District Court abused its discretion in abstaining from a consideration of the constitutional issues sought to be presented, until the appropriate State court had considered and decided both State and Federal questions in the companion action which appellant had previously instituted and which was then simultaneously pending in the State court.

CONCLUSION

As previously stated, counsel for appellees assert that the instant litigation presents a classic case for application of the abstention doctrine; indeed, a more appropriate case for invocation of the doctrine can hardly be imagined. Counsel for appellees submit therefore that the question upon which the decision in this case depends is so unsubstantial as to obviate further argument and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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WILLIAM M. MCCLENNY
Commonwealth's Attorney for Amherst County

Amherst, Virginia

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for appellees in the above-captioned matter, hereby certify that copies of this Statement of Appellee Opposing Jurisdiction and Motion to Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 5th day of May, 1967, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Frank G. Davidson, Jr., Esq., P. O. Box 1160, Lynchburg, Virginia, and Thomas S. Currier, Esq., 1801 Westview Road, Charlottesville, Virginia, counsel for appellant.

.....

Assistant Attorney General

Appendix "A"

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 24, 1967

The Honorable Robert Y. Button
Attorney General of Virginia
State Library Building
Richmond, Virginia

RE: SWEET BRIAR INSTITUTE v. BUTTON, ET AL.
No. 1106, October Term, 1966

Dear Sir:

The above-captioned appeal was docketed in this Court on March 1, 1967, and our records indicate that you were served with a copy of the jurisdictional statement.

The Court has directed this office to request that you file on or before May 5, 1967 a response to the jurisdictional statement. Such a response usually takes the form of a motion to dismiss or affirm.

Forty printed copies of your response, together with proof of service thereof, should be forwarded to reach this office before the May 5 deadline. However, if you are unable to have it printed in that period of time, you may forward forty typewritten or otherwise reproduced copies.

Very truly yours,

JOHN F. DAVIS, Clerk

By: MICHAEL RODAK, JR.
Deputy Clerk

jmh

cc: William M. McClenny, Esq.
Frank G. Davidson, Jr., Esq.
Thomas S. Currier, Esq.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SWEET BRIAR INSTITUTE *v.* BUTTON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 1106. Decided May 29, 1967.

PER CURIAM.

The judgment of the United States District Court for the Western District of Virginia is reversed. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964). The case is remanded for consideration on the merits. Section 202 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–1. *Kline* v. *Burke Construction Co.*, 260 U. S. 226.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would affirm the judgment.